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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 917

ESTATE OF WILLIAM T. MAYER, PHILIP A. PAGANO, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 26a-32a)[1] are reported at 43 T.C. 403. The *per curiam* opinion of the Court of Appeals (Pet. 10-11) is reported at 351 F. 2d 617.

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[1] "R." references are to petitioner's printed appendix in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on October 20, 1965. (Pet. 10.) The petition for a writ of certiorari was filed on January 17, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner, a certified public accountant serving as executor of an estate and actively participating in the affairs of the estate, failed to file a timely estate tax return. The question presented is whether petitioner's reliance on counsel selected by him constitutes, as a matter of law, such "reasonable cause" for the failure to file a timely return as to avoid the addition to tax provided in Section 6651 of the Internal Revenue Code of 1954.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

> SEC. 6651. FAILURE TO FILE TAX RETURN.
>
> (a) *Addition to the Tax.*—In case of failure to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), * * * on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an ad-

ditional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

(b) *Penalty Imposed on Net Amount Due.*—For purposes of subsection (a), the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed upon the return.

* * * *

(26 U.S.C. 1958 ed., Sec. 6651.)

Treasury Regulations on Procedure and Administration (1954 Code):

Sec. 301.6651-1 [as amended by T.D. 6585, 1962-1 Cum. Bull. 290] FAILURE TO FILE TAX RETURN.

(a) *Addition to the tax*—(1) *In general.* In case of failure to file a return required under authority of—

(i) Subchapter A, chapter 61, of the Code, relating to returns and records (other than sections 6015 and 6016, relating to declarations of estimated tax, and part III thereof, relating to information returns);

* * * *

and the regulations thereunder, on or before the date prescribed for filing (determined with regard to any extension of time for such filing), there shall be added to the tax required to be shown on the return the amount specified below

unless the failure to file the return within the prescribed time is shown to the satisfaction of the district director or the director of the regional service center to be due to reasonable cause and not to willful neglect. (See subparagraph (3) of this paragraph.) The amount to be added to the tax is 5 percent thereof if the failure is for not more than one month, with an additional 5 percent for each additional month or fraction thereof during which the failure continues, but not to exceed 25 percent in the aggregate.

* * * *

(3) *Showing of reasonable cause.* A taxpayer who wishes to avoid the addition to the tax for failure to file a tax return must make an affirmative showing of all facts alleged as a reasonable cause for his failure to file such return on time in the form of a written statement containing a declaration that it is made under penalties of perjury. Such statement should be filed with the district director with whom the return is required to be filed. If the district director or the director of the regional service center determines that the delinquency was due to a reasonable cause, and not to willful neglect, the addition to the tax will not be assessed. If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause.

* * * *

(26 C.F.R., Sec. 301.6651-1.)

STATEMENT

William T. Mayer died on October 9, 1958. Philip A. Pagano, his executor (hereinafter referred to as the executor), filed a United States estate tax return with the District Director of Internal Revenue at Manhattan, New York, on March 7, 1960. The return was due on January 9, 1960. (R. 27a.)

The executor, a certified public accountant of the Bronx, New York, most of whose clients were small retail businesses, mainly liquor stores, was familiar with both federal and state income taxes and had limited experience in New York and federal estate tax matters. (R. 27a.)

Promptly upon his qualification, the executor retained William J. Schmitt, an attorney, to represent him in all matters involving the discharge of his duties as executor, including the preparation of New York and federal estate tax returns. The executor considered Schmitt qualified in such matters. (R. 27a.)

On January 12, 1959, the executor filed an "Estate Tax Preliminary Notice" (Form 704) in which he estimated decedent's gross estate to be $888,500. (R. 28a.) The notice, a single sheet, contained the following in boldface type (R. 29a):

> NOTICE.—Failure to file a required return on Form 706 within 15 months from the date of death may render executors, administrators, and persons in actual or constructive possession of the decedent's property liable for penalties.

The estate's assets included stock in three closely held corporations. In order to establish a more accurate basis for reporting the value of that stock on the federal estate tax return, it was decided that the stock should first be valued by the New York tax authorities. On August 10, 1959, the executor filed a New York estate tax return and requested prompt review so that the value of this stock could be agreed upon before the federal estate tax was due. There were subsequent negotiations, involving approximately eight conferences, with the New York tax authorities, in which the executor worked closely with Schmitt. The parties reached an agreement on February 16, 1960, as to the value of the stock in one of the corporations and on March 1, 1960, as to the value of the stock in the two other corporations. (R. 28a.)

Although the executor relied upon Schmitt to prepare the necessary tax returns for the estate, in proper form, for his signature, and timely file such returns, the executor himself was actively engaged, along with Schmitt, in the preparation of the returns and admittedly "may have known", or "could have found out, the due date for filing," but "did not concern himself" with it. (R. 28a.)

Schmitt made a diary notation that the federal estate tax return in question was due on March 9, 1960. He was not aware of his miscalculation until he received notice from the District Director, dated February 16, 1960, that the estate tax return was overdue. (R. 28a.)

After the estate tax return had been filed, the Commissioner determined a deficiency in the amount of $34,668.91 (not contested) and added the penalty equal to 10 percent of that amount ($3,466.89), pursuant to Section 6651 of the 1954 Code, for failure to file the return on time. (R. 29a.)[2] The taxpayer petitioned the Tax Court for redetermination of the deficiency attributable to the penalty only. (R. 29a.) The Tax Court sustained the Commissioner's determination and entered a decision against the estate. (R. 33a.) The Court of Appeals affirmed, *per curiam*. (Pet. 10-11.)

ARGUMENT

The decision below is correct. There is no conflict in decisions or other reason warranting further review.

1. The simple question involved is whether the failure of the petitioner-executor of the Mayer estate to file a timely estate tax return was "due to reasonable cause and not due to willful neglect." Section 6651(a), Internal Revenue Code of 1954, *supra*, p. 2. Both courts below found that in the circumstances of this case petitioner, whose "important responsibility" it was to file a timely return, "failed to exercise the ordinary business care and prudence that could reasonably be expected of him" (R. 31a; Pet. 11). The

[2] After the estate tax return was filed the Commissioner imposed a 10 percent penalty, under Section 6651(a) of the 1954 Code, based on the amount of estate tax reported on the return. That amount was paid and is not involved in this litigation. (R. 29a.)

retention of an attorney, of course, does not automatically relieve an executor from all responsibility of seeing to it that the attorney acts with diligence (*Ferrando* v. *United States*, 245 F. 2d 582 (C.A. 9). The total immunity from responsibility which petitioner seeks seems particularly inappropriate here where, as both courts below observed, they were not dealing with "a situation where an executor who is not well versed in tax law and in business matters relies completely on a tax expert to handle such matters" (R. 31a; Pet. 11). Petitioner-executor is a certified public accountant "familiar with both Federal and State income taxes insofar as they relate to his clients" (R. 27a). He "extensively participated" with attorney Schmitt "in matters dealing with the estate tax return"; he worked closely with the attorney in stock valuation negotiations germane to the filing of the estate tax return; and he filed an Estate Tax Preliminary Notice which in bold-face type advised that failure to file an estate tax return within 15 months might subject him to penalties (R. 30a). Moreover, the necessity of filing a return within 15 months was hardly an obscure or conceptually difficult requirement beyond petitioner's comprehension. Significantly, he admitted (R. 25a) that "While I may have known, or could have found out the due date for filing, I did not concern myself with that since I relied on Mr. Schmitt to prepare the return in good time." [3]

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[3] Petitioner and the attorney Schmitt submitted affidavits to the Commissioner asserting their inability to establish the

2. This case is not in conflict with *In re Fisk's Estate* v. *Commissioner*, 203 F. 2d 358 (C.A. 6). As the Tax Court noted (R. 32a) "it did not appear that the taxpayer [in *Fisk's Estate*] knew the due date of the return, had the background in tax matters that Pagano has, or worked closely with the attorney in respect of estate matters." Other cases cited by petitioner (Pet. 7, 8) are equally distinguishable, involving situations in which either expert advice was obviously required in order to determine the threshold question whether it was necessary to file any return, or, if a return was indicated, the taxpayer was unknowledgeable and dependent upon advice of counsel. In any event, as the Court of Appeals has stated in the opinion below, "Reasonable cause can be determined only from the particular situation persented in each specific case. Other decisions *pro* and *contra* are of little help." (Pet. 11.)

3. Contrary to petitioner's assertion (Pet. 8-9), the decision below is not one of general administrative importance. Its effect, if any, beyond the present litigation, would seem to be the salutary one of implementing the admonition in *Ferrando* v. *United States*, 245 F. 2d 582 (C.A. 9), that knowledgeable taxpayers are not relieved of their legally imposed

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value of the estate assets with the New York taxing authorities and the insufficiency of liquid assets with which to pay the estate tax until after the due date (R. 30a, fn. 2). Petitioner does not contend that these explanations warrant a finding of "reasonable cause" for the failure to file. As the Tax Court pointed out, the return could nevertheless have been timely filed, without remittance and with an estimation of the value of the estate assets (R. 30a, fn. 2).

duties merely by their reliance upon others. This is not an area in which the need for planning by taxpayers requires a rule of indubitable certainty; and since "[r]easonable cause can be determined only from the particular situation presented in each specific case" no such rule is possible. Accordingly, further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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